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State v. Rowland Appellant's Brief Dckt. 42229

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO, Plaintiff-Respondent, v. JASON ROWLAND, Defendant-Appellant.	NO. 42229 GOODING COUNTY NO. CR 2013-2398 APPELLANT'S BRIEF

BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF GOODING

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STATEMENT OF THE CASE

Nature of the Case

Jason Rowland entered a conditional guilty plea to one count of felony possession of a controlled substance, preserving his right to appeal the denial of his motion to suppress. He appeals from the district court's Judgment of Conviction.

Mr. Rowland asserts that his right to be free from unreasonable searches and seizures, protected by the Fourth and Fourteenth Amendments to the United States Constitution and Article I § 17 of the Idaho Constitution, was violated because law enforcement officers searched his person without a warrant and in the absence of any valid exceptions to the warrant requirement.

Prior to the search in which illegal contraband was discovered in Mr. Rowland's pants pocket, Mr. Rowland was merely detained for officer safety while the officers conducted a search warrant. Mr. Rowland asserts that the State failed to meet its burden of proving that the search of his person fell within an exception to the warrant requirement as the warrant did not allow for a search of his person. The district court erred when it denied his motion to suppress finding that that the search warrant authorized a search of his person or, alternatively, that he was lawfully searched incident to arrest.

Statement of the Facts and Course of Proceedings

On the evening of November 2, 2013, officers entered Jason Rowland's home. (2/27/14 Tr., p.6, L.18 – p.7, L.2.) The officers had a search warrant and were looking for a stolen chainsaw and drugs. (2/27/14 Tr., p.8, Ls.11-13.) Officer Thiemann encountered Mr. Rowland in the basement and detained Mr. Rowland by handcuffing

him.[1] (2/27/14 Tr., p.8, L.2 – p.9, L.4.) She then asked another officer to perform a pat-down search of Mr. Rowland for weapons, and one of the items retrieved from Mr. Rowland's pants pocket was a baggie containing a crystal substance, which was later determined to be methamphetamine. (2/27/14 Tr., p.9, Ls.14-26, p.16, Ls.16-18, p.22, Ls.3-6; PSI, p.130.) Mr. Rowland was arrested for possession of stolen property, possession of drug paraphernalia (found in another room of the house), and possession of a controlled substance.[2] (2/27/14 Tr., p.10, Ls.5-25.)

On November 25, 2013, an Information was filed charging Mr. Rowland with felony possession of a controlled substance, methamphetamine, and misdemeanor possession of drug paraphernalia. (R., pp.45-47.) A persistent violator sentencing enhancement was also filed as Part II of the Information. (R., pp.48-50.) Mr. Rowland filed a Motion to Suppress and Memorandum in Support requesting that the district court suppress "all evidence seized, all statements made by the defendant, and all fruits or products of the warrantless search and seizure of the defendant." (R., p.108.) Mr. Rowland asserted that his rights under Article I, Sections 13 and 17 of the Idaho Constitution, and under the Fourth and Fourteenth Amendments of the United States Constitution were violated. (R., pp.108-112.) Mr. Rowland asserted that the search warrant was exclusively for certain property in the residence. (R., pp.109-110.) Although the final page of the warrant constituted a "command to search the above described premises and persons" there was no indication in the warrant that

[1] Although the State failed offer any evidence of the search warrant encompassing Mr. Rowland's home, a search warrant was issued which authorized law enforcement to search the premises for illegal drugs and a Stihl chainsaw. (11/4/13 Search Warrant, attached to Motion to Augment filed on February 12, 2015.)

Mr. Rowland was to be searched when the warrant was executed. (R., p.110.) Mr. Rowland also asserted that the search was not a valid *Terry* search for weapons because the search was not just a pat-down for weapons.[3] (R., p.110.) Further, Mr. Rowland was not under arrest at the time he was searched and the methamphetamine was discovered. (R., p.110.)

At the hearing on the suppression motion, the prosecutor called Officer Thiemann. (2/27/14 Tr., p.5, Ls.2-13.) Officer Thiemann testified that she requested the search warrant and executed the search warrant at Mr. Rowland's house.[4] (2/27/14 Tr., p.6, L.23 – p.7, L.2.) Officer Thiemann went inside the house with other law enforcement officers, but she initially went downstairs into the basement area. (2/27/14 Tr., p.7, L.22 – p.8, L.2.) After tripping and falling over multiple objects on the stairs, including a chainsaw case and chainsaw parts, she made contact with Mr. Rowland in the basement. (2/27/14 Tr., p.8, Ls.1-19.) She immediately detained Mr. Rowland by placing handcuffs on him. (2/27/14 Tr., p.8, L.24 – p.9, L.4.) She testified that he was not under arrest at that time, but he was being detained as they were securing everybody in the residence for the search warrant. (2/27/14 Tr., p.14, L.23 – p.15, L.4, p.16, L.21 – p.17, L.4.) After handcuffing Mr. Rowland, she took him up the stairs and handed him off to another officer, saying: "He has not been patted down or checked for weapons." (2/27/14 Tr., p.9, Ls.14-25.) She continued searching and found, in the

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[2] Mr. Rowland was never prosecuted for possessing the stolen chainsaw. (*See* Idaho Supreme Court Data Repository).

[3] In *Terry*, the United States Supreme Court held that "an officer may conduct a limited pat-down search, or frisk, 'of the outer surfaces of a person's clothing all over his or her body in an attempt to find weapons.'" *Terry v. Ohio*, 392 U.S. 1, 16 (1967).

room located at the top of the stairs, drug paraphernalia, a white powdery substance, and a green leafy substance. (2/27/14 Tr., p.10, Ls.3-9.) After the paraphernalia and controlled substances were found, the officers removed the pieces of the chainsaw and matched the serial number to the one identified as stolen. (2/27/14 Tr., p.10, Ls.5-13.) Officer Thiemann testified that she told Mr. Rowland what he was under arrest for when she transported him to the jail—for possession of paraphernalia, possession of the white powdery substance found in his pocket, and possession of stolen property. (2/27/14 Tr., p.10, Ls.14-25.)

The State called Officer Bekker to testify. (2/27/14 Tr., p.19, Ls.16-17.) Officer Bekker testified that he was on duty on November 2, 2013, and that he was at a residence participating in the service of a search warrant. (2/27/14 Tr., p.20, Ls.19-24.) While Mr. Rowland was detained, Detective Bekker was asked to search Mr. Rowland's person so he conducted a "Terry search" of Mr. Rowland's pants pockets and discovered a white powdery substance, later identified as methamphetamine, in a pocket of the pants.[5] (2/27/14 Tr., p.21, L.16 – p.22, L.6, p.27, Ls.15-18, p.28, Ls.13-23.) At the time, Officer Bekker knew that Mr. Rowland was detained, as he was in the handcuffs. (2/27/14 Tr., p.29, L.22 – p.30, L.1.)

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[4] The residence was actually his mother's house, but Mr. Rowland had resided there, with his mother, for approximately the last nine years. (2/27/14 Tr., p.11, Ls.12-19; 11/21/13 Tr., p.12, Ls.16-23.)

[5] Officer Bekker testified that in conducting a "Terry search," or pat-down, he has been trained to take everything out of the person's pockets to confirm that there's nothing there that's going to hurt him, and then he sets it off to the side to be given back to them after – once they are released, if they're only being detained. (2/27/14 Tr., p.26, Ls.7-14.)

At the hearing on Mr. Rowland's motion to suppress, the defense and the State both presented argument. The State argued that this was either a search incident to arrest and that such a search can precede the actual arrest so long as it is recent in time, or the search was authorized because Mr. Rowland was on location for the service of a search warrant, or, as a third theory, that the drugs would have been discovered under the inevitable discovery argument, based on the decision in *State v. Cook*, 106 Idaho 209 (Ct. App. 1984). (2/27/14 Tr., p.30, L.13 – p.35, L.9.) The State also argued that the officers had probable cause to conclude that Mr. Rowland possessed the chainsaw. (2/27/14 Tr., p.38, L.23 – p.39, L.7.) The defense argued that the residence, and the illegal objects found therein, could not be tied to Mr. Rowland. (2/27/14 Tr., p.35, L.23 – p.36, L.23.) The defense further argued that the search warrant was only for the residence, not the search of the person of Mr. Rowland. (2/27/14 Tr., p.37, Ls.1-6.)

The district court took the matter under consideration and issued a written decision denying the motion, finding that the search warrant mentioned Mr. Rowland and thus authorized a search of the residence as well as a search of Mr. Rowland's person "for the items described in the warrant which included the chainsaw, Methamphetamine, Marijuana, and drug paraphernalia." (R., p.131.) The district court also found that the officers had probable cause to arrest Mr. Rowland once Detective Thiemann saw the chainsaw as described in the search warrant. (R., pp.131-133.) The district court declined to address the State's alternative argument that the evidence would have been inevitably discovered. (R., pp.124-133.)

Following the denial of his suppression motion, Mr. Rowland entered a conditional guilty plea to felony possession of a controlled substance, reserving the right to appeal the suppression issue. (3/25/14 Tr., p.3, L.17 – p.4, L.4; R., pp.145-146.) As part of the plea agreement, the State agreed to dismiss the misdemeanor possession of paraphernalia charge, the persistent violator enhancement, and the enhancement for a subsequent drug offense. (3/25/14 Tr., p.3, L.17 – p.4, L.4, p.12, Ls.3-14, p.20, Ls.6-11; R., pp.145-146.) On June 10, 2014, Mr. Rowland was sentenced to a unified sentence of seven years, with three years fixed, and the district court retained jurisdiction.[6] (R., pp.152-161.) On June 13, 2014, Mr. Rowland filed a Notice of Appeal. (R., pp.168-171, 179-183.)

[6] As of the filing of his Appellant's Brief, Mr. Rowland was still on the rider. (Idaho Supreme Court Data Repository.)

ISSUE

Did the district court err when it denied Mr. Rowland's motion to suppress?

ARGUMENT

The District Court Erred When It Denied Mr. Rowland's Motion To Suppress

A. Introduction

Mr. Rowland asserts that his right to be free from unreasonable searches protected by Article I, § 17 of the Idaho Constitution and the Fourth Amendment to the United States Constitution was violated when officers conducted a warrantless search of his person.

Mindful of the inevitable discovery exception to the exclusionary rule, Mr. Rowland asserts that his right to be free from unreasonable searches and seizures was violated because law enforcement officers searched his person without a warrant and in the absence of any valid exceptions to the warrant requirement.[7]

B. Standard Of Review

When reviewing an order granting or denying a motion to suppress evidence, Idaho appellate courts accept the trial court's factual findings unless they are clearly erroneous; factual findings supported by substantial competent evidence are not clearly erroneous. *State v. Munoz,* 149 Idaho 121, 128 (2010); *State v. Araiza,* 147 Idaho 371, 374 (Ct. App. 2009). Decisions regarding the credibility of witnesses, weight to be given

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[7] The doctrine of inevitable discovery, or the independent source doctrine, is an exception to the exclusionary rule. *State v. Bunting*, 142 Idaho 908 (Ct. App. 2006). In order for the inevitable discovery doctrine to apply, the State must show by a preponderance of the evidence that the information at issue would have independently been discovered through lawful means. *Id.* 142 Idaho at 915. Although the inevitable discovery doctrine was never analyzed by the district court in this case, even had Officer Bekker not (impermissibly) searched Mr. Rowland when he did, Mr. Rowland would eventually have been arrested for possession of stolen property and searched incident to his arrest. (*See* 2/27/14 Tr., p.17, L.21 – p.18, L.2, p.33, L.10 – p.35, L.7.)

to conflicting evidence, and factual inferences to be drawn are also within the discretion of the trial court." *Id.* (quoting *State v. Bishop*, 146 Idaho 804, 810 (2009)). However, a trial court's legal conclusions and whether constitutional requirements have been satisfied based on the facts found are freely reviewed. *Araiza,* 147 Idaho at 374.

C. The District Court Erred When It Denied Mr. Rowland's Motion To Suppress Because The District Court Erroneously Found That The Search Warrant Included A Person(s) To Be Searched

Mr. Rowland challenges the district court's factual finding that the scope of the search warrant included the search of his person. The district court found that the search warrant identified Mr. Rowland as a person to be searched. However, the search warrant was for a residence only and did not allow for any persons to be searched. It is not possible to reconcile the search warrant with the district court's finding of fact because there were no persons identified by the search warrant. Therefore, the district court's reading of the search warrant to include the person of Mr. Rowland was unreasonable. Thus the search warrant cannot constitute substantial, competent evidence to support the district court's finding that Mr. Rowland was identified in the search warrant as a person to be searched, and the district court's finding was clearly erroneous.

The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV; Idaho Const. Art. I, § 17. A warrant under the Fourth Amendment must "particularly describ[e] the place to be searched, and the persons or things to be seized." U.S. CONST. amend. IV. Thus, when a warrant includes a person to be searched, the warrant must identify with particularity which person or persons may

be searched pursuant to the search warrant. *Id.* A search warrant, like the one in this case, identifying several individuals as persons having knowledge of one of the items being searched for, is insufficient to authorize a search of any person. Here, the plain language of the warrant did not authorize the officers to search any persons found at the residence. *C.f. Commonwealth v. Brown,* 861 N.E.2d 504 (Mass. App. Ct. 2007) (holding that search warrant did not satisfy particularity requirement of Fourth Amendment where warrant only authorized search of "any person present" and did not name anyone as a person who may be searched); *State v. Garcia,* 166 P.3d 848 (Wash. Ct. App. 2007) (holding that search warrant for "any and all persons present" in motel room violated Fourth Amendment's requirement of particularity); *Webster v. State*, 250 A.2d 279 (Md. Ct. Spec. App. 1969) (holding that search of appellant could not be upheld under provision of warrant which commanded search of "all other persons who may be participating in said criminal activities").

The Idaho Court of Appeals has held that "[i]n general, courts should avoid hypertechnicality when interpreting warrants" and that "[w]arrants should be viewed in a commonsense and realistic fashion." *State v. Sapp*, 110 Idaho 153, 155 (Ct. App. 1986); *State v. Holman*, 109 Idaho 382, 388 (Ct. App. 1985). In both *Sapp* and *Holman*, the relevant question was whether the search warrants at issue were sufficiently specific in identifying the places to be searched in order for the warrants to be valid on their faces. *Sapp*, 110 Idaho at 154-56; *Holman*, 109 Idaho at 388. In both cases, the Court of Appeals recognized that a search warrant need not contain a technical legal description of the place to be searched. In both cases, the Court held that as long as the warrant contains a description sufficient for the place to be searched to be located

and distinguished from surrounding areas, the warrant is valid on its face. *Sapp*, 110 Idaho at 155-56; *Holman*, 109 Idaho 388.

When law enforcement officers are executing a search warrant on a property, officers are allowed to briefly detain the occupants of the premises described in the warrant. *Michigan v. Summers*, 452 U.S. 692, 705 (1981); *State v. Slater*, 133 Idaho 882, 889 (Ct. App. 1999). In *Summers*, the Court explained, "a warrant to search for contraband founded on probable cause implicitly carries with it the limited authority to detain occupants of the premises while a proper search is being conducted." *Id.* at 705. This limited authority to detain occupants arises for three important reasons identified by the Court: 1) preventing the flight of the occupants, 2) minimizing the potential for harm to law enforcement, and 3) facilitating the completion of the search. *Id.* at 702-03.

The search warrant in this case did not authorize the search of Mr. Rowland, and in fact the search warrant did not authorize the search of any persons—the warrant was only for the search of a residence. (11/4/13 Search Warrant, attached to Motion to Augment filed on February 12, 2015.) If the warrant was intended to allow for the search of Mr. Rowland, it was deficient.

The actual search warrant is contained in the first three paragraphs, and describes the premises to be searched, and the property to be searched for. (11/4/13 Search Warrant, pp.1-2, attached to Motion to Augment filed on February 12, 2015.) It is clear that the rest of the warrant, anything after paragraph three, is merely extraneous language which mirrors the affidavit. (11/4/13 Search Warrant, attached to Motion to Augment filed on February 12, 2015.) Notably, the search warrant does not identify any persons as persons to be searched pursuant to the warrant. (11/4/13 Search Warrant,

attached to Motion to Augment filed on February 12, 2015.) While several individuals were named in the affidavit, the language of the warrant does not dictate that any of the persons named in the affidavit be searched. (11/4/13 Search Warrant, attached to Motion to Augment filed on February 12, 2015.)

The warrant incorporated the language of the affidavit in its entirety. The place to be searched was identified in Paragraph 1:

> The following location/s: A dwelling located at 529 California Street in the City of Gooding, County of Gooding and State of Idaho, the dwelling is tan in color with brown trim with the front door located on the face of the house facing East.

(11/4/13 Search Warrant, p.1, attached to Motion to Augment filed on February 12, 2015.) The property to be searched was identified in Paragraph 2:

> For the following property: Marijuana, Meth, drug trafficking paraphernalia along with any implements, and paraphernalia used in the sale, and use of Marijuana or Meth, including, but not limited to scales, zip lock baggies, paper bindles, photographs, sifters, ledger books or other sheets memorializing the sale of any controlled substances, all apparent instrumentalities or items evidencing the same, packaging materials, records, utility receipts, envelopes, letters, keys and other indicia of control, ownership, to-wit A [sic] dwelling located at 529 California street [sic] in the City of Gooding, County of Gooding and State of Idaho, the dwelling is tan in color with brown trim with the front door located on the face of the residence facing East. The numbers 529 California located on the north side of the front door.

(11/4/13 Search Warrant, p.1, attached to Motion to Augment filed on February 12, 2015.) A liberal reading of the warrant could include the chainsaw described in Paragraph 3:

> Jeremy Todd Larson told me that he had stolen a chain saw [sic] and that he dropped it off with Jason Rowland located at 529 California Street. The information that we have received on the chain saw [sic] made by Stihl and that the serial number is 282877540 and that it is orange and white in color and that it was in an orange case.

(11/4/13 Search Warrant, pp.1-2, attached to Motion to Augment filed on February 12, 2015.) The final page of the search warrant includes the language:

> YOU ARE THEREFORE COMMANDED to search the above described premises and persons for the property described above, TO SEIZE it if found and to bring it promptly before the court above named.

(11/4/13 Search Warrant, p.4, attached to Motion to Augment filed on February 12, 2015.) However, the boilerplate language "search the above described premises and persons" is a reference to the premises. The standard language at the end of the warrant is insufficient to allow a reasonable conclusion that any persons were to be searched. (11/4/13 Search Warrant, pp.1-2, attached to Motion to Augment filed on February 12, 2015.) Because search warrants must be given a commonsense reading, the search warrant in this case only permits a search of the residence because there were no "persons" specifically identified and described in the warrant as those to be searched pursuant to the warrant.

Ultimately, a valid search warrant may not be expanded to include places or persons not described therein.[8] In this case, if the officers believed the evidence sought could likely have been found on Mr. Rowland's person, the State could simply have

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[8] At the suppression hearing, the State argued that search warrants may authorize the search of a person, and relied on a recent Court of Appeals opinion, *State v. Russo,* 2013 WL 777438 (Ct. App. March 4, 2013), for this proposition (2/27/14 Tr., p.31, L.3 - p.32, L.8.); however, the opinion relied upon by the State was not yet final, and the Idaho Supreme Court granted review of the decision. *State v. Russo*, 157 Idaho 299, 336 P.3d 232 (2014). Although the Idaho Supreme Court affirmed the judgment of conviction, it noted that the record did not reflect whether the officer was aware that a search warrant had been issued before detaining the defendant and patting him down. *Russo*, 157 Idaho at ___, 336 P.3d at 238, n.1. Thus the State's authority in support of its contention that a search warrant authorizes police to seize and search a person as part of the service of the search warrant was based on an unpublished opinion that was superseded by an Idaho Supreme Court opinion, and is therefore unpersuasive.

sought a warrant authorizing a search of his residence *and his person*. While the officers were permitted to detain Mr. Rowland based on his status as an occupant of the house, such was not sufficient to allow a search of his person.

D. The District Court Erred When It Denied Mr. Rowland's Motion To Suppress Because Officer Bekker's Search Of Mr. Rowland Was Beyond The Permissible Scope Of A Fourth Amendment *Terry* Frisk For Weapons

The officer's search of Mr. Rowland's pocket was beyond the scope of a *Terry* frisk and was beyond the minimum intrusion necessary to determine if Mr. Rowland was armed. The officer's decision to indiscriminately remove all contents of Mr. Rowland's pockets was unreasonable and exceeded the scope of a legitimate weapons search under the Fourth Amendment, and the district court erred in denying Mr. Rowland's motion to suppress all evidence stemming from the unlawful search.

The Fourth Amendment of the United States Constitution prohibits unreasonable searches and seizures, and warrantless searches are presumptively unreasonable. *See, e.g., State v. LaMay*, 140 Idaho 835, 837-838 (2004). The State may overcome the presumption of unreasonableness by demonstrating that the warrantless search fell within a well-recognized exception to the warrant requirement. *LaMay*, 140 Idaho at 838. If the State fails to meet this burden, the evidence acquired as a result of the illegal search, including later-discovered evidence derived from the original illegal search, is inadmissible in court. *State v. Brauch*, 133 Idaho 215, 219 (1999); *Segura v. United States,* 468 U.S. 796, 804 (1984); *Illinois v. Krull*, 480 U.S. 340, 347 (1987).

One exception to the warrant requirement was established by the United States Supreme Court in *Terry v. Ohio*, 392 U.S. 1 (1968). The stop and frisk exception established in *Terry* allows an officer to stop and frisk an individual for weapons if the

officer can point to specific, articulable facts that would lead a reasonably prudent person to believe the individual with whom the officer is dealing may pose a risk of danger to the officer or others, and nothing in the initial stages of the encounter serves to dispel this belief. *Terry*, 392 U.S. at 27, 30; *State v. Henage*, 143 Idaho 655, 660-661 (2007); *State v. Watson*, 143 Idaho 840, 843 (Ct. App. 2007). The lawfulness of a pat-down search is evaluated objectively, in light of the facts known to the officer on the scene, and the inferences of the risk of danger reasonably drawn from the totality of those specific circumstances. *Henage,* 143 Idaho at 660-661.

As the Court in *Terry* recognized, "[a] search which is reasonable at its inception may violate the Fourth Amendment by virtue of its intolerable intensity and scope." 392 U.S. at 18-19 (citations omitted). Accordingly,

> [t]he permissible scope of a pat-down search for weapons is limited to the minimum intrusion necessary to reasonably assure the officer that the suspect does not have a weapon. If the officer is unable to make an objectively reasonable determination that an object causing a bulge under a person's clothing is not a weapon by feeling its size and density, the officer is entitled to further invade the person's privacy only to the extent necessary that such a determination can be made.

Watson, 143 Idaho at 845.

The circumstances surrounding the search here are very close to those addressed by the Idaho Court of Appeals in *Watson*. 143 Idaho 840. In *Watson*, police were called to investigate the defendant after neighbors reported he was causing a disturbance. *Id.* at 842. In speaking with the defendant, the officer saw a bulky object protruding from the pocket of the defendant's pants. *Id.* After handcuffing the defendant, the officer did a pat-down search for weapons. *Id.* The officer felt a hard object, but was unable to determine if the object was a weapon. *Id.* at 845-846. As a

result, rather than simply removing the hard object from the pocket, the officer emptied the entire contents of the defendant's pocket. *Watson*, at 846. In emptying the contents of the defendant's pocket, the officer found money, a toothpaste container, keys, and a plastic bag containing methamphetamine. *Id.* at 842.

The defendant moved to suppress the methamphetamine evidence, which the district court denied. *Id.* On appeal, the Court of Appeals held that the officer's intentional removal of all items from the defendant's pocket, including those that could not have been weapons, was unreasonable. *Id.* at 847. Specifically, the Court found that, "the officer exceeded the scope of a pat-down search for weapons when he emptied [the defendant's] pocket." *Id.; see also State v. Cook*, 106 Idaho 209, 220-21 (Ct. App. 1984) (holding that officer's reaching into defendant's pocket to remove money, instead of conducting "pat-down" search for weapons, exceeded permissible scope of detention to conduct investigative stop). When an officer "has reason to believe that the suspect is armed and presently dangerous, the officer is entitled to 'conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which may be used to assault him.'" *Id.* at 214-15 (quoting *Terry*, 392 U.S. at 30). In *Cook*, where no evidence was presented that the officer searching the defendant believed that the wad of money found in his pants felt like a weapon, the search went beyond the permitted scope of a frisk for weapons. *Id.* at 215.

In this case, based on the totality of the circumstances, Officer Thiemann and Officer Bekker had no reasonable, articulable basis to believe that Mr. Rowland was armed or posed a risk of danger to any of the officers. First, there was no testimony or evidence presented at the suppression hearing which would lend support to either

officer believing that Mr. Rowland may pose a risk of danger to the officer or others. (*See* 2/27/14 Tr.) Nor did the search warrant did not identify any weapons believed to be located in the house. (11/4/13 Search Warrant, attached to Motion to Augment filed on February 12, 2015.) Second, Officer Bekker testified that he did not feel anything that was metal or a knife or a gun when he patted down the outside of Mr. Rowland's clothing. (2/27/14 Tr., p.29, Ls.6-21.) Third, like the defendant in *Watson*, Mr. Rowland was handcuffed at the time of the search which would have seriously limited his ability to access and use a weapon. (2/27/14 Tr., p.9, Ls.2-4, p.29, L.25 – p.30, L.1.)

Additionally, the "Terry search" of Mr. Rowland was far beyond the permissible pat-down for weapons permitted under the *Terry* exception to the warrant requirement. Here, Officer Bekker explained that he performed a "Terry search" of Mr. Rowland, meaning:

> A. All I search on a Terry search is their belt, where their hands are going to be when they're handcuffs, and their front and back pockets to make sure they can't grab anything.
>
> Q. So in your training, a pat-down does involve you reaching into someone's pocket and removing everything?
>
> A. In their front and back pockets, correct. A full search would be on the chest.

(2/27/14 Tr., p.27, Ls.3-12.)

Thus, because the search involved taking everything out of Mr. Rowland's pockets, the search exceeded the scope of a permissible *Terry* pat-down. *See Watson.* Mr. Rowland asserts that the search was illegal and any evidence obtained as a result must be suppressed as "fruit of the poisonous tree." *See Wong Sun v. United States,* 371 U.S. 471, 478-88 (1963).

E. The District Court Erred When It Denied Mr. Rowland's Motion To Suppress Because Mr. Rowland Was Not Under Arrest Until After The Incriminating Item Was Found On His Person And The Police Did Not Have Probable Cause To Arrest Him Prior To The Search Of His Person

In the present case, because this was a warrantless search of Mr. Rowland's person, the State bore the burden of proving that the search fell within a well-recognized exception to the warrant requirement. Although the State asserted that this was a search incident to arrest exception (2/27/14 Tr., p.30, Ls.13-17), that exception is inapplicable based on the facts of this case where Mr. Rowland was not under arrest at the time of the search, and there was no probable cause to arrest him prior to the search of his person. Thus, officers searched Mr. Rowland's pockets without a valid exception to the warrant requirement. As such, the district court erred when it denied his motion to suppress.

A search incident to a lawful arrest is exempted from the Fourth Amendment's warrant requirement. *Cook*, 106 Idaho at 215. A warrantless arrest and warrantless search incident to that arrest can legally occur in the event the arresting officer has probable cause to believe the arrestee has committed a public offense. *Id.* Further, if an arresting officer has probable cause to believe that an arrestee committed an offense, a search incident to an arrest can legally occur before the arrestee is formally arrested. *Id.*

Probable cause is information which would lead a person of ordinary care and prudence to believe or entertain an honest and strong suspicion that the subject of arrest is guilty. *State v. Alger*, 100 Idaho 675, 677 (1979). Moreover, a probable cause determination must be particularized to the person searched or seized and cannot be "undercut or avoided by simply pointing to the fact that coincidentally there exists

probable cause to search . . . the premises where the person happens to be." *State v. Gibson*, 141 Idaho 277, 283 (Ct. App. 2005) (quoting *Ybarra v. Illinois*, 444 U.S. 85, 91 (1979)).

Here, officers did not have probable cause to arrest Mr. Rowland at the time he was searched. The district court held that the presence of a chainsaw in the house was sufficient probable cause to arrest Mr. Rowland for possession of stolen property; however, such was error. (R., p.132.) A chainsaw is a relatively common tool that may be found in a residence and is not so unique an item as to instantly be recognizable as contraband. Many homes have chainsaws, and the presence of chainsaw parts, where the warrant identified a Stihl brand chainsaw, does not, in and of itself, constitute probable cause to believe this was the chainsaw the thief described, particularly where Officer Thiemann testified that she had not yet verified the serial number on the chainsaw parts matched that of the stolen chainsaw. (2/27/14 Tr., p.10, Ls.1-25, p.16, L.21 – p.18, L.2.) Further, there were several people inside the house when the warrant was served and there was no testimony or evidence adduced that tied Mr. Rowland to the chainsaw parts found on the stairs. (2/27/14 Tr., p.24, Ls.20-24.) Thus there was no evidence adduced at the suppression hearing which would show that Mr. Rowland was in possession of the chainsaw parts at the time of the search of his person.

The district court erred when it found that the search of Mr. Rowland's person was covered by the search warrant or constituted a valid exception to the warrant requirement. And, therefore, the district court erred in failing to suppress the evidence obtained in the illegal search of Mr. Rowland's person.

CONCLUSION

Mr. Rowland respectfully requests that this Court vacate the district court's order of judgment and commitment, reverse the order which denied his motion to suppress, and remand his case for further proceedings.

DATED this 12th day of February, 2015.

SALLY J. COOLEY
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 12th day of February, 2015, I served a true and correct copy of the foregoing APPELLANT'S BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

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SJC/eas